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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1295

OXNARD SCHOOL DISTRICT BOARD OF TRUSTEES,

Petitioner,

vs.

DEBBIE AND DOREEN SORIA, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner, Oxnard School District Board of Trustees, respectfully prays that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on November 27, 1973.

Opinion Below.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

Jurisdiction.

A judgment of the Court of Appeals for the Ninth Circuit was entered on November 27, 1973, and this petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

Question Presented.

Whether court-ordered busing to achieve a racial and ethnic balance is justified where there has been no finding that a school board has engaged in a purposeful or intentional policy of segregation.

Statutory Provisions Involved.

"Federal Rules of Civil Procedure, Rule 65. Injunctions. —(a) Preliminary injunction. (1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

". . .

"(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

"(d) Form and scope of injunction or restraining order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

Statement of the Case.

The respondents, Debbie and Doreen Soria, *et al.*, as students in the Oxnard School District, on February 20, 1970, filed in the District Court a complaint for injunctive and declaratory relief for deprivation of their rights to equal protection of the law and due process of law. Thereafter, respondents moved for summary judgment. The District Court granted that motion and required this petitioner to submit a workable plan for eliminating racial and ethnic imbalance within the Oxnard School District. That plan, which included substantial busing of students, was embodied in the summary judgment of the District Court of July 21, 1971.

This petitioner appealed the judgment of the District Court. After extensive briefing and oral argument, the Court of Appeals for the Ninth Circuit vacated that judgment and remanded the matter to the District Court. The Court of Appeals found that the factual issue of whether this petitioner purposefully or intentionally segregated the Oxnard School District was an issue which should be resolved at a trial on the merits.

Nevertheless, the Court of Appeals, while indicating that there was insufficient evidence to find that this petitioner had practiced a deliberate policy of racial segregation, required this petitioner to continue the court-ordered busing, which had been based on the erroneously granted summary judgment.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With the Decisions of This Court.

The Court of Appeals for the Ninth Circuit, in vacating the summary judgment, indicated at page 15 of its opinion that "(t)he cold record consisting of even colder maps, charts and statistics" did not provide an adequate foundation for making a determination that this petitioner practiced a deliberate policy of racial segregation. In vacating that judgment, the Court of Appeals relied on two recent cases of this Court.

The first is the case of *Swann v. Charlotte-Mecklenburg Board of Education,* 91 S.Ct. 1267 (1971). Therein at page 1282, this Court held that:

> "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes."

The second is the case of *Keyes v. School Dist. No. 1, Denver, Colorado,* 93 S.Ct. 2686 (1973). Therein at page 2697, this Court emphasized:

> ". . . that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is *purpose* or *intent* to segregate."

Although the Court of Appeals applied the correct standard in vacating the summary judgment, it ignored that standard when it required the court-ordered busing to remain in effect pending a trial on the merits. The requirement of court-ordered busing, when there is in-

sufficient evidence to find a constitutional violation, is in conflict with the decisions of this Court. The requirement of court-ordered busing, when there is insufficient evidence to find a purpose or intent to segregate, is in conflict with the decisions of this Court.

2. The Decision Below Raises Significant and Reoccurring Problems Concerning the Duty of School Boards to Alleviate Racial and Ethnic Imbalance Within Their Districts.

If the decision of the Court of Appeals is allowed to stand, it will create confusion among school boards throughout this nation as to their duty to alleviate racial and ethnic imbalance within their districts. This confusion will occur because the decision stands for the proposition that school boards are subject to court-ordered busing even though there has been no judgment entered against them and no preliminary injunction granted requiring such busing.

Certainly, a check of the record in this case will indicate that: no motion for preliminary injunction has been filed; no hearing directed toward the issues of whether a preliminary injunction should be granted has ever been held; no consideration has been given to whether respondents should have posted security to cover the cost of court-ordered busing; no court has ever granted a preliminary injunction; and no judgment has ever been in a form indicating it purported to grant a preliminary injunction. In short, the requirements of Rule 65 of the Federal Rules of Civil Procedure relating to the granting of a preliminary injunction have not been met.

Conclusion.

Court-ordered busing, in addition to being expensive, places an artificial demand on our nation's natural resources at a time when those resources should be conserved. Courts should order busing only when they are satisfied that a school board has engaged in a purposeful or intentional policy of segregation. Court-ordered busing absent a finding of such a policy of segregation is unjustified.

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

DOROTHY L. SCHECHTER,
County Counsel, County of Ventura,
State of California,
Attorney for Petitioner.

APPENDIX.

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U.S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

Re: No. 71-2929 Debbie & Doreen Soria, et al. vs. Oxnard School District Board of Trustees

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered 11-27-73 vacating and remanding the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Clerk
U.S. Court of Appeals

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Debbie and Doreen Soria, et al., Plaintiffs-Appellees, vs. Oxnard School District Board of Trustees, Defendant-Appellant. No. 71-2929.

Filed: Nov. 27, 1973.

Appeal from the United States District Court for the Central District of California.

Before: CHOY and GOODWIN, Circuit Judges, and McNICHOLS,* District Judge.

CHOY, Circuit Judge:

Debbie and Doreen Soria and other elementary school students in the Oxnard School District (the Students) brought this class action for declaratory and injunctive relief in the district court for themselves and all other similarly situated minority (Hispano/Negro) students). They alleged that the Oxnard School District Board of Trustees (the School board/the Board) by certain acts and omissions had "consistently maintained and perpetrated a systematic scheme of racial segregation by capitalizing on a clear pattern of *de facto* racial segregation in Oxnard . . . ." Further, they charged that the Board had deprived them of equal educational opportunities in violation of the equal protection clause of the Fourteenth Amendment, and by reason of this destructive pattern of racial segregation had also deprived them of liberty in violation of that amendment's due process clause. The Board denied the allegations of unconstitutional segregation and inequality, and asserted it had acted at all times in

*The Honorable Ray McNichols, United States District Judge for the District of Idaho, sitting by designation.

good faith without discriminating between racial and ethnic groups.

After a substantial volume of facts was obtained through discovery devices, the Students moved for summary judgment. Finding no material question of fact in dispute, the district court granted summary judgment in favor of the Students and ordered the implementation of a desegregation plan for the district's elementary schools. The School Board appeals. We vacate and remand for further proceedings.

Since at least 1964, the Board has maintained neighborhood schools pursuant to its policy declaration that: "The Oxnard School District shall establish and maintain neighborhood schools so far as it is practical to do so." The Students do not claim that the attendance zones for these neighborhood schools have been intentionally gerrymandered by the School Board upon racial or ethnic considerations. Nor has the state of California or the city of Oxnard ever maintained a "dual school system" wherein students have been assigned to schools on account of race or ethnic background. Indeed, since 1963 California law has required that school boards alleviate racial imbalance in the state's schools, as far as reasonably feasible, regardless of the cause for the imbalance. *Jackson v. Pasadena City School District*, 59 Cal. 2d 876, 31 Cal. Rptr. 606, 382 P.2d 878 (1963). Nevertheless, the facts adduced in the district court reveals the existence of a pattern of racial and ethnic disproportion within Oxnard's elementary schools under the neighborhood school policy of the Board.

The Oxnard School District is relatively small, consisting of twelve elementary schools and two junior high schools with the greatest distance between any two

schools being approximately four miles. The two junior high schools are conceded to be racially and ethnically integrated and are thus not a part of this action. The elementary school geographic attendance zones are demographically grouped into three definable areas of the city. The Colonia in the eastern part of the city is primarily Hispano/Negro; the Northwest which is populated almost exclusively by Anglos; and the Southcentral where the racial and ethnic population is more evenly mixed.

The percentage breakdown of the district's 7,483 elementary school students by racial and ethnic origin is 55% Hispano/Negro, 43% Anglo and 2% other. Prior to November, 1970 when the School Board instituted a busing plan permitting certain students to attend schools other than those assigned to their neighborhood, ten of the district's twelve elementary schools were racially and ethnically imbalanced.[1]

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[1]The racial and ethnic composition of the district's twelve elementary schools was as follows:

	% Anglo	Anglo Students	Hispano/Negro Students
Colonia			
Juanita School	6%	40	606
Ramona School	4%	25	507
Rose Avenue School	19%	213	918
		278	2031
Northwest			
Curren School	85%	452	52
Marina West School	71%	572	207
Sierra Linda School	83%	598	88
		1622	347
Southcentral			
Brittell School	65%	251	122
Driffill School	25%	183	547
Elm School	42%	171	228
Harrington School	63%	232	134
Kalama School	49%	320	323
McKinna School	24%	131	421
		1298	1774

From the facts presented to the district court through discovery by answers to interrogatories, affidavits, and admissions of the School Board, the Students submitted seventy-four proposed findings of fact as required by a local rule of court.[2] Except as to certain proposed findings deemed by it to be either conclusionary or overly subjective, the Board stipulated to every finding of fact proposed by the Students. These

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Cal. Admin. Code, Title V. §10421 provided: "For purposes of these regulations, a racial or ethnic imbalance is indicated in a school if the percentage of pupils of one or more racial or ethnic groups differs by more than 15 percentage points from that in all the schools of the district. . . ."

It is no longer open to question that Hispanos and Negroes may be grouped together for the purpose of determining whether a school or school system is unconstitutionally segregated since these groups suffer identical discrimination in treatment when compared with the treatment afforded Anglo students. *Keyes v. School District No. 1, Denver, Colorado,* .... U.S. .... (Slip opinion, June 21, 1973 at 7-8); *Cisneros v. Corpus Christi Independent School District,* 467 F.2d 142, 144-45 (5th Cir. 1972). However, "[w]hat is or is not a segregated school will depend on the facts of each particular case." *Keyes, supra,* at 6. Such factors as the racial and ethnic composition of each school's student body, the racial and ethnic composition of the faculty and staff as well as administration attitudes toward the school must all be recognized and taken into consideration as elements in the definition of a "segregated school."

[2]*United States District Court, Central District of California, Rule 3(g)* states:

> 1. There shall be served and lodged with each motion for summary judgment pursuant to Rule 56 F.R.Civ.P. proposed findings of fact and conclusions of law and proposed summary judgment. Such proposed findings shall state the material facts as to which the moving party contends there is no genuine issue.
>
> 2. Any party who opposes the motion shall, not later than five (5) days after service of the notice of motion upon him, serve and file a concise "statement of genuine issues" setting forth all material facts as to which it is contended there exists a genuine issue necessarily to be litigated.
>
> 3. In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are controverted by affidavit filed in opposition to the motion.

proposed findings of fact reveal certain actions of the School Board since 1961 with regard to the location of new school sites, use of temporary mobile classrooms, adoption of integration plans, student busing plans, and the placement as well as teaching experience of the school staffs.

(1) *New school sites*—Between 1964 and 1966 the Board opened three new schools. Marina West opened in 1964, was built in the western extremity of the district and subsequently had a student enrollment which was 72% Anglo. In 1965 a new school was opened at the Rose Avenue site in the eastern section of the Colonia and thereafter had a student population which was 19% Anglo. Finally, the new Sierra Linda School was completed and opened for use in 1966. This school was located in the Northwest section of the city and had a student enrollment of whom 75% were Anglo.

The Board refused to agree to a proposed finding of fact that "the imposition of a neighborhood school plan on a racially segregated residential pattern had the foreseeable result of causing racially imbalanced attendance areas and therefore, such actions cast *de jure* overtones." The Board claimed that new schools were constructed only in overcrowded neighborhoods requiring new facilities and that, in all cases, attendance zone lines for the new schools were drawn with regard to natural boundaries such as major streets and highways.

(2) *Temporary classroom units*—Since 1961 the Board has authorized the addition of temporary, mobile classrooms known as "portables" to certain schools. Portables were used first at the Colonia schools but were later added to schools in the Northwest and South-

central regions. The Students contend that the School Board has "consistently placed portables in such a way as to keep Anglos in Anglo schools and Hispano/Negroes in minority schools." The Board, however, refused to concede this to be true and asserted that portables were placed only where required because of overcrowded conditions.

(3) *Integration proposals*—The Board failed to adopt any of several integration plans suggested by various public as well as private groups and individuals. These include recommendations in 1963 by the N.A.A.C.P. that several oppositely imbalanced schools be paired, thereby reducing the disproportion of Anglo and Hispano/Negroes in each of the combined schools and that certain boundary adjustments be made in the district. That same year the superintendent of the district suggested that "jig-sawed" boundary lines be drawn for the school attendance zones. In 1968 the Bureau of Intergroup Relations of the California Department of Education proposed changing certain boundaries, moving portables from Rose Avenue to majority imbalanced schools in the district, transporting pupils from the Colonia to other schools and pairing various schools. A so-called "Princeton Plan" was presented to the School Board in February, 1969, as well as a plan which again recommended pairing certain schools and moving portables from the Colonia. Similar suggestions were received in November, 1969, and as a part of its Master Plan for the district, the Board resolved the following month to "[m]ove portables from Colonia sites to reduce crowding, and to facilitate classroom space in the north and west of town for integration use." In February, 1970 a further resolution to relocate fourteen portable classrooms was adopted, and in

April of that year specific schools outside the Colonia were scheduled to be the sites for these additional portables. However, in June the Board decided to postpone bids for the relocation and effectively rescinded the earlier resolutions.

The School Board rejected a proposed finding of fact that its failure to relocate portable classrooms to alleviate racial imbalance was "with knowledge of its results and cast overtones of *de jure* segregation." The Board argued instead that its failure over the years to adopt various plans is not culpable since it was under no duty to affirmatively achieve more racial balance in the school district.

(4) *Student bus transportation*—Beginning in February, 1964 the School Board implemented an "open enrollment" plan for the purpose of alleviating "*de-facto*" segregation in the district. This plan proved minimally effective. By October, 1965 only forty-seven students (there is no indication what percentage were Anglo or Hispano/Negro) were attending schools in neighborhoods other than their own. The School Board revised its policy in 1970 when it authorized student busing in either of two situations. Where enrollment in certain grade levels at a school were overcrowded, students were to be transported to less crowded schools on a "last-enrolled—first bused" basis. And as underenrollment in a school provided available space, students from throughout the district could choose to enroll in those schools.[3]

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[3]The School Board policy pertaining to student bus transportation states in Article 7, Section 607.3: *Enrollment Regulations* —Pupils who reside within an attendance area established for the ensuing year, will have priority to attend that school. However, returning enrollees who are not in attendance by the end of the second week of school will abrogate their priority if

The Board refused to admit a proposed finding that its "busing policy aggravated the already existing segregated patterns . . . [N]evertheless the Board continued it, allowing Anglo students to escape the Colonia; the Board did this with full knowledge of the segrega-

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classes at their grade levels have reached the district maximum. These children will be assigned to a school with available space. Pupils who move into an attendance area where the maximum enrollments for their grades in that school have been reached shall be assigned to a school where space is available.

Article 5 Open Enrollment 605.1—Purpose: In order to alleviate the problems related to de facto segregation, and as a convenience to parents, the Oxnard School District permits open enrollment throughout the district on a space-available basis.

605.2 Individual Intradistrict Transfer: A parent may request a transfer of his child to attend a school outside his area of residence. Permission will be granted for the current year if space is available. Space available will be determined by average class size as established by the district . . . .

605.4 Transportation—Transportation to the new school becomes the responsibility of the parents; however, transportation will be provided if there is space available on an existing bus route. Transportation provided under these circumstances may be discontinued whenever regularly authorized transportation requires the bus space.

The following table shows the change in Anglo imbalance within the district after commencement of the revised busing plan.

	% Anglo Before Busing	% Anglo After Busing
Colonia		
Juanita School	6%	4%
Ramona School	4%	3%
Rose Avenue School	19%	9%
Northwest		
Curren School	85%	75%
Marina West School	71%	71%
Sierra Linda School	83%	81%
Southcentral		
Brittell School	65%	57%
Driffill School	25%	24%
Elm School	42%	41%
Harrington School	63%	54%
Kalama School	49%	47%
McKinna School	24%	24%

tive effect of its policy and hypocritically maintained that it was acting to alleviate segregation." Rather, the Board asserted, its student busing plan was not a ploy to allow "white flight" from the Colonia, but was undertaken in the hope of bettering the district's racial balance. Further it claimed that the busing plan in fact resulted in a better racial mix in the schools.

(5) *Teacher placement and experience*—As of June, 1970 there were 253 teachers in the school district of whom nineteen or 7.5 percent were Hispano/Negro. Each of the Colonia schools had a higher percentage of minority teachers than this district-wide average, with a total of ten Hispano/Negro teachers assigned to the three Colonia schools. Moreover, with an average teaching experience of 8.83 years for the entire district, all three Colonia schools were below this mean while Curren and Sierra Linda schools were above this average with 11.1 and 11.8 years respectively.

The Board controverted a proposed finding of fact that "the deficiency in Hispano/Negro teachers is manifest" and that the School Board "by hiring and placement of teachers, has stigmatized the District racially, and in particular, has stigmatized certain minority schools by making them more clearly racially identifiable."

The School Board contended that additional facts showed that there was no discriminatory pattern in the district's faculty hiring and placement policies. With regard to teacher experience, it pointed to the staff of Elm and Kalama schools, where each school had less average teacher experience than any of the Colonia schools. Further, the Board asserted that an indication of its efforts to obtain quality teaching in the Colonia

schools was the fact that the highest salary expenditure per pupil in the entire district was at Juanita School with Marina West ranking ninth. Finally, the School Board claimed that it has actively recruited Hispano/Negro teachers at a rate in excess of the state average.

In granting the summary judgment after considering all the facts submitted, the district court stated two independent grounds for its decision. First, citing *Brown v. Board of Education* (I), 347 U.S. 482 (1954) it held that the maintenance of racially separate educational facilities provided inferior educational opportunities to the Students and therefore denied them their rights to equal protection of the laws guaranteed by the Fourteenth Amendment.[4] Second, the court determined that "sufficient 'de jure overtones' established by the agreed-upon findings of fact . . . entitle plaintiffs to relief." 328 F. Supp. 155, 157 (C.D. Cal. 1971). The court ordered the School Board to propose a desegregation plan in compliance with the State Board of Education's definition of a balanced school system so that no school differed from the racial-ethnic composition of the district as a whole by more than plus or minus fifteen percent.

After meetings between the parties, the Board submitted a proposed plan calling for the pairing of several schools and transporting of some students to school by bus. The district court approved this plan and ordered it into effect beginning in the 1971 fall school term. The Board attempted to stay the desegregation

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[4]The parties submitted extensive sociological data and studies on the issue of whether racially imbalanced classes and schools materially affect the educational opportunities of minority students. But, we do not reach and therefore intimate no view on the merits of this question.

order by applications to this court and the Supreme Court, but these requests were denied.[5]

The School Board does not challenge here, as it had done earlier in applying for stays, any part of the remedial desegration plan which the district court ordered be implemented. Nor does the Board contend that in granting summary judgment for the Students the court acted precipitously by precluding the possibility of a trial on the merits. Instead, in arguing for reversal it maintains that the district court's holding of "*de jure overtones*" was erroneous. Though it concedes that a significant part of the district is racially and ethnically imbalanced, the Board contends that such imbalance does not *per se* constitute a constitutional violation where the schools only reflect the racial and ethnic composition of the areas in which they are located.

The School Board argues that under *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971) it is required to integrate the district schools only if it caused the racial imbalance. In *Swann,* which involved school districts having a long history of deliberate ractial segregation, the School Board points out, the Court cautioned against blaming the school district for other factors which may have contributed to some

[5]The United States intervening pursuant to 28 U.S.C. §2403 contends the constitutionality of the "Broomfield Amendment," Pub. L. No. 92-318, 86 Stat. 235, §803 is drawn into question in this proceeding. A previous decision of this court on the School Board's request for a stay of the district court ordered desegregation plan obviates further consideration of this issue. *Soria v. Oxnard School District Board of Trustees,* 467 F.2d 59 (9th Cir. 1972). We there held that §803 has no retroactive effect in a case pending at the time of the statute's effective date where the integration plan providing for student bus transportation is already in effect.

extent to the composition of schools. *Swann, supra* at 22-23. The Board mentions such factors as zoning laws, low cost housing, and private restrictive covenants. Since there is no finding here that the School Board deliberately maintained two sets of schools in its system in order to carry out a policy of separating students on the basis of race, the Board maintains that no constitutional violation has been established. "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes." *Swann, supra* at 28.

The Students, however, contend that *Swann* does not provide support for the School Board's position because the Court there was not faced with the issue of a school board's accountability in a non-formally segregated school system. The Court did not reach the question "whether a showing that school segregation as a consequence of other types of state action, without any discriminatory action by school authorities, is a constitutional violation requiring remedial action by a school desegregation decree." *Swann, supra* at 23. Therefore, the Students maintain that the School Board's accountability for its segregated schools resulting as a natural, foreseeable consequence of its acts and omissions remains open for this court's consideration, regardless of any discriminatory motives behind such acts. The district court judge apparently accepted this legal theory since it ruled that the Board's contention that it had never intentionally or purposefully segregated its school system did not raise a disputed question of material fact for purposes of summary judg-

ment. By so holding, the district court applied an improper legal standard for determining whether the Board had committed unconstitutional segregation.

In *Keyes v. School District No. 1, Denver, Colorado,* .... U.S. .... (slip opinion, June 23, 1973) the Supreme Court for the first time gave full consideration to a so-called "northern *de facto* segregation" case where public schools had been operated under no constitutional or statutory provisions which either mandated or permitted racial or ethnic segregation of students. The district court in *Keyes* held that through various acts such as school construction policies, gerrymandering attendance zones, use of so-called "optional zones," and excessive use of portable classrooms, the Denver School Board had engaged in an unconstitutional policy of deliberate racial segregation in the Park Hill section of the city's school system. Affirming this finding of unconstitutional segregation, the Court held prerequisite the determination that the school authorities had intentionally discriminated against minority students by practicing a deliberate policy of racial segregation. The Court emphasized that the differentiating factor between so-called *de facto* segregation and the *de jure* segregation held constitutionally impermissible in *Brown v. Board of Education* (I), 347 U.S. 483 (1954) was that in the latter case there was present a *purpose* or *intent* to segregate. *Keyes, supra* at 18. Once a finding of intentional segregation is made, the school authorities must assume the affirmative obligation of converting their school system into a unitary one where "racial discrimination would be eliminated root and branch." *Green v. County School Board,* 391 U.S. 430, 438 (1968).

Whether the School Board's acts and omissions here constitute intentional segregation is disputed, at least by the Board. It refused to admit any of the Students' proposed findings of fact which suggested that it had intentionally created or maintained segregated schools, and sought to have this issue litigated at a trial. In opposing summary judgment before the district court, the Board submitted the affidavit of Doran W. Tregarthen, Superintendent of the Oxnard School District, who declared that the racial imbalance in Oxnard was the result of neighborhood population patterns and not of intentional segregation by the School Board; that student assignments, busing policies, portable utilizations and selection of school construction sites were all based upon sound administrative determinations; that no students from the Northwest schools were bused into the Colonia during 1970-1971 because of the overcrowded conditions then present in the Colonia which prohibited any additional students from enrolling in those schools; that the district had an active recruitment program for hiring Hispano/Negro teachers and compared well with other districts in the state in their hiring of such minority teachers. These facts, if accepted by the district court, would negate a finding of intentional segregation. It is impossible to divine what evidence the School Board would have proffered in support of its contention that "sound administrative determinations" were the basis for its actions. These raised factual issues which should have been resolved at a trial.

On a motion for summary judgment the role of the district court is limited, since it does not try the factual issues but must determine instead whether there are any such issues to be tried. *United States v. Bissett-Berman Corp.*, 481 F.2d 764, 767 (9th Cir. 1973); *Nyhus v.*

Travel Management Corp., 446 F.2d 440, 442 (D.C. Cir. 1972); *American Mfrs. Mut. Ins. Co. v. American Broadcasting—Paramount Theaters, Inc.*, 388 F.2d 272, 279 (2d Cir. 1967).

The district court's conclusion from the agreed-upon facts that the School Board's acts and omissions constitute *"de jure* overtones" is inconclusive and vague on the question of the School Board's segregative intent. Although "overtones" certainly implies that there was present an intention to segregate, nowhere in either the district court's opinion or the undisputed proposed findings of fact is this conclusion made explicit. As stated by this court: "If the district court were permitted to weigh the evidence and resolve issues in making its findings of fact and conclusions of law, we would properly find from the evidence here that the findings and conclusions should be sustained. It is necessary to determine, however, whether viewing the evidence as a whole and the inferences to be drawn therefrom in the light most favorable to the [party opposing the motion for summary judgment] it may be said that there is no genuine issue of fact,[11] mindful also of the fact that there is no express finding to that effect by the district court."

> "[11]An issue of fact may arise from inferences to be drawn from the evidence, and all doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment. *Cameron v. Vancouver Plywood Corporation*, 9 Cir. 1959, 266 F.2d 535, 539."

United States v. Western Electric Co., 337 F.2d 568, 572 (9th Cir. 1964); *see also United States v. Lange*, 466 F.2d 1021, 1026 (9th Cir. 1972).

The Students cite *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1970) as supporting their contention that summary judgment should be upheld in this case, since that case involved issues similar to those here and the grant of summary judgment for the plaintiffs was affirmed. But, in *Gautreaux* the question of the housing authorities' intent to maintain residential segregation of the races by their choice of sites for public housing projects was not disputed. In three separate affidavits, employees of the housing authority admitted that racial quotas had been used in determining those sites. 296 F. Supp. at 909. Nor was it disputed that city aldermen vetoed proposed sites in the white area because the 90% Negro waiting list for public housing would have created a concentrated Negro population in those sections of the city. 436 F.2d at 308. That situation is clearly distinguishable from the one here, where the School Board claims that only legitimate educational interests motivated its actions, and denies that it had an intent to create or maintain segregated schools. *See St. Helena Parish School Board v. Hall*, 287 F.2d 376 (5th Cir. 1961); *Branche v. Board of Education*, 204 F. Supp. 150 (E.D.N.Y. 1962).

This court's decision in *Kelly v. Guinn*, 456 F.2d 99 (9th Cir. 1972) does not require a conclusion contrary to the one reached here. In *Kelly*, the district court found after a trial on the merits that the actions of the school authorities constituted a constitutional violation. Affirming that finding, we specifically made reference to the district court's determination that: "While eliminating segregation for the students above the sixth grade level, the District, at the same time, aggravated the incidence of segregation at the elementary level by

constructing two new elementary schools in the black residential area. This bifurcated neighborhood school policy of the Clark County School District is principally responsible for the aggravation of racial segregation in the elementary schools. . . ." 456 F.2d at 105-06. There are no findings here as to the cause of the "segregation" in Oxnard's elementary schools. Indeed, there is no designation as to which, if any, of the schools, are in fact segregated as distinguished from being racially imbalanced. Only by inferring the necessary causation from the underlying facts could we conclude that any schools in Oxnard are segregated and that the segregation resulted from the School Board's discriminatory actions or failure to take actions. This case, however, arising from the grant of summary judgment precludes the drawing of those inferences against the School Board. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Chrystal City v. Del Monte Corp.*, 463 F.2d 976, 981 (5th Cir. 1972); *United States v. Western Electric Co., supra*, 337 F.2d at 572.

The record in this case, aside from the various pleadings and motions of the parties, consists primarily of copies of minutes of the School Board's meetings since 1956 and the School Board's answers to hundreds of interrogatories propounded by the Students. Although voluminous, its value for purposes of this appeal is questionable. The School Board's minutes are unenlightening since they merely acknowledge by recording the fact that certain actions were taken by the School Board. They contain no discussion of the options considered in making these decisions, and for the most part detail only the routine administrative decisions necessary in the normal operation of a school system. The School Board's answers to interrogatories, apart

from their being condensed into the proposed findings of fact, are similarly of slight value. Yet, this is not surprising since the purpose of such interrogatories is not to guide the court in deciding the relative merits of the issues, but rather to limit and clarify the issues for the parties in preparation for further trial proceedings. *See 4A* Moore's Federal Practice at ¶33.02 (2d ed. 1972). In effect, this leaves only the undisputed proposed findings of fact and the arguments of counsel upon which to decide if the School Board has practiced a deliberate policy of racial segregation. The cold record consisting of even colder maps, charts and statisticis does not provide an adequate foundation for making such determination. *See Bradley v. Milliken,* [6th Cir. slip opinion, filed Dec. 8, 1972] *aff'g* 338 F.Supp. 582 (E.D. Mich. 1971); *Hoots v. Pennsylvania,* 359 F.Supp. 807, 821 (W.D. Pa. 1973).

Although the school district is a small one, this does not reduce the need for the full exploration of a trial, where evidence can be presented, witnesses examined and cross-examined. Consideration can there be given to the relative merits of the School Board's contentions that in selecting school sites, determining attendance zones, assigning students, utilizing portables, and hiring and placing faculty, only justifiable criteria formed the bases for such actions. In this context, the credibility, and therefore the weight to be accorded the school officials' testimony, is crucial (in determining whether there were available alternatives to those decisions, which would not have worsened the racial imbalance existing in the school system.) *United States v. School District 151,* 301 F.Supp. 201, 226, 229-30 (N.D. Ill. 1969), *mod. on other grounds,* 432 F.2d 1147 (7th Cir. 1970).

The function of this court is not to determine whether there is sufficient evidence from which the requisite intent and cause of segregated schools can be deduced when there are no explicit findings on these questions and the parties raise contradictory inferences from the facts. "If reasonable inferences could be drawn . . . such that the issue would be submitted to the trier of fact, then [F.R.Civ.P.] Rule 56(c) leaves us no latitude and we must return that issue to the trier of fact, in this case the judge." *Empire Electronics Co. v. United States,* 311 F.2d 175, 180-81 (2d Cir. 1962); *see Consolidated Electric Co. v. United States,* 355 F.2d 437, 440 (9th Cir. 1966).

Since the fall of 1971 the School Board has been operating under the district court ordered desegregation plan. We shall not at this time undo that result and the remedial integration order shall remain in effect subject to the district court's discretion and final resolution of this litigation.

Vacated and remanded.

SUPREME COURT U. S.

FILED

MAR 25 1974

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1295

OXNARD SCHOOL DISTRICT BOARD OF TRUSTEES,
Petitioner,

vs.

DEBBIE AND DOREEN SORIA, *et al.*,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Question Presented.

Whether, pending the outcome of a trial on the sole issue of "intent to segregate", the *status quo* should be disturbed by staying the operation of a remedial integration plan which has been in effect for three years.

Statement of the Case.

The respondents, a class composed of Mexican-American and Black children, filed suit in the United States District Court for the Central District of California (hereinafter District Court) in February of 1970, alleging that the schools in petitioners' district were racially segregated and that said segregation was the result of acts and omissions of the petitioners. Re-

spondents sought an order desegregating the twelve elementary schools in petitioner school district. On May 10, 1971, after extensive discovery had been undertaken, respondents moved for Summary Judgment, based upon the answers to interrogatories, admissions, affidavits and proposed findings of fact. The District Court granted the Motion for Summary Judgment on May 12, 1971. See *Soria v. Oxnard School District Board of Trustees,* 328 F.Supp. 155 (1971).

The petitioners twice sought stays in 1971 from the United States Court of Appeals for the Ninth Circuit (hereinafter Ninth Circuit) and once from the District Court; all were denied without opinion. Again in 1972, petitioners sought stays in the Ninth Circuit (467 F.2d 59) and in this Court; all were denied. Thus, the school district has been integrated since September of 1971, as a result of the District Court's decision.

Meanwhile, petitioners had appealed the Summary Judgment of the District Court. On November 27, 1973, the Ninth Circuit vacated the Summary Judgment and remanded the case to the District Court with instructions to make findings as to whether the petitioners intended to segregate the schools. See *Soria v. Oxnard School District Board of Trustees,* 488 F. 2d 579 (1973). Since the Ninth Circuit found the District Court's opinion "inconclusive and vague" on the question of segregative intent, the District Court was ordered to hold a trial on the single question of whether or not petitioners had the requisite segregative intent. 488 F.2d at 587-588.

The Ninth Circuit also refused to disturb the existent desegregation plan implemented by the District Court:

> "Since the fall of 1971, the School Board has been operating under the District Court ordered desegregation plan. We shall not at this time undo that result and the remedial integration order shall remain in effect *subject to the District Court's discretion* and final resolution of this litigation." (Emphasis added.) 488 F.2d at 588.

Subsequent to the expiration of time in which to request a rehearing before the Ninth Circuit, and subsequent to the spreading of the mandate before the District Court, petitioners sought a stay from the Ninth Circuit of that portion of its mandate which allowed the remedial integration plan to remain in effect. On February 27, 1974, the Ninth Circuit denied the stay without opinion. The petition to this Court followed.

A pretrial hearing in the District Court is now scheduled to be held on May 20, 1974, and the trial, which is estimated to last approximately five days, is now scheduled to begin on June 4, 1974.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

The question which petitioners present is not yet ripe for consideration by this Court and is untimely in that petitioners have not pursued their appropriate remedies in the District Court nor in the Ninth Circuit. *Cf. Walters v. City of St. Louis,* 347 U.S. 231 (1954). Before presenting their petition to this Court, petitioners should have first requested the District Court to halt the remedial integration plan and requested the Ninth Circuit to rehear the case or to recall its mandate.

1. Petitioners Failed to Exhaust Their Judicial Remedies in the District Court and in the Ninth Circuit.

The Ninth Circuit's recent decision refusing to disturb the remedial integration plan properly recognized that the immediate undoing of the remedial integration plan would cause chaos in the school district, but left the continuation of that plan subject to the District Court's discretion.

It is a very basic notion that a higher court should not consider the question until and unless it was first presented in the lower courts. *Cf. Walters v. City of St. Louis, supra; Hormel v. Helvering,* 312 U.S. 552 (1941). The petitioner has failed to move in the District Court or otherwise attempt to have the District Court exercise its discretion to accomplish what petitioners are now seeking to accomplish before this Court. Petitioners should first petition the District Court in this matter; that Court is in the best position to fully evaluate all consequences and effects of changing its original order through the taking of evidence. See *Soria*

v. Oxnard School District Board of Trustees, 488 F. 2d at 588.

Moreover, petitioners also have failed to move for a rehearing in the Ninth Circuit and to request that Court to recall its mandate. Thus, there has been a complete failure on petitioners' part to have the District Court and the Ninth Circuit consider the discontinuance of the remedial integration plan.

2. The Ninth Circuit Has the Power to Prevent Irreparable Damage to Respondents.

The Ninth Circuit, acting under its equity powers, properly exercised this power in preventing the irreparable harm that would be caused by the sudden discontinuance of the remedial integration plan prior to a final District Court decision. It is well established that appellate courts have such power, as stated in *In re Barnett,* 124 F.2d 1005 (2d Cir. 1942):

> "It is established doctrine . . . that in disposing of a case before it, that an appellate court has a broad power 'to make such disposition . . . as justice requires.' " 124 F.2d at 1009.

See *State of Minnesota v. National Tea Company,* 309 U.S. 551, at 555 (1940).

Other cases support the position that the Court has the necessary power to continue the remedial integration plan. In the case of *Texaco, Inc. v. Chandler,* 354 F.2d 655 (10th Cir. 1965), *cert denied* 383 U.S. 936 (1966) the Court stated that the Court "has the power and inescapable duty, whether under the all-writs statute, 28 U.S.C. §1651, or under its inherent powers of appellate jurisdiction, to effectuate what seems to us to be the manifest ends of justice." The manifest ends of

justice herein is the continuation of the remedial desegregation plan.

3. A Decision on the Merits Will Be Reached in the District Court Before a Hearing on the Writ Would Normally Be Held by This Court.

Granting the Petition would serve no useful purpose because the only question which petitioners are attempting to raise concerns the propriety of continuing the remedial integration plan pending the outcome of a trial on the issue of segregative intent. *Cf. United States v. American Broadcasting-Paramount Theaters,* 383 U.S. 906 (1966) (Petition denied). The trial is scheduled to begin on June 4, 1974, and the District Court's decision should be available soon thereafter.

In their unsuccessful motion for a stay in the Ninth Circuit, petitioners concede that even if they had the legal authority to return to segregated neighborhood schools, they would not do so during the present school year, but would only do so in the fall of 1974. See Application for Stay Pending Review on Writ of Certiorari, pages 1 and 27 (Application denied by Justice Douglas on March 14, 1974). Since the District Court's decision should be available in sufficient time for petitioners to plan for the fall 1974 school year, there is no good reason for this Court to grant the Writ.

4. The Decision Below Does Not Conflict With the Decisions of This Court.

The Ninth Circuit, in vacating the Summary Judgment, made it quite clear that it was following the two cases which petitioners cite, *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); and *Keyes v. School Dist. No. 1, Denver, Colorado,*

..... U.S. ....., 93 S.Ct. 2686 (1973). See *Soria v. Oxnard School District Board of Trustees, supra,* 488 F.2d at 585. There was no attempt on the part of the Ninth Circuit to distinguish these cases or otherwise deviate from their requirements.

The Ninth Circuit remanded the case to the District Court for a factual determination of whether the School Board intended to segregate the school district and, pending the determination of that issue, continued the existing desegregation plan. This continuation of the plan can in no way be construed as causing a conflict with decisions of this Court.

5. The Decision of the Ninth Circuit Creates No Confusion Among School Boards.

This case is unique in that a desegregation plan has been in effect for three years. The Ninth Circuit, in vacating the Summary Judgment, also faced the question of what to do pending the trial on the single factual question of intent to segregate. That Court correctly decided that it would allow the *status quo* to continue, at the discretion of the District Court, until there was a resolution in the District Court. In no sense does the decision of the Ninth Circuit stand for the proposition that school districts are subject to desegregation orders without a finding of intention to segregate.

It is important to note that in its Summary Judgment the District Court *did* find intention to segregate under the standard that then existed. See *Soria v. Oxnard School District Board of Trustees, supra,* 328 F. Supp. at 157. Now three years later, that standard has been clarified by this Court in *Keyes v. School*

Dist. No. 1, Denver, Colorado, supra, 93 S.Ct. at 2697. The District Court must now determine whether the actions and inactions of the petitioners amounted to intentional segregation under the *Keyes* standard. In the interim, the desegregation plan remains in effect, subject to the discretion of the District Court.

Conclusion.

For the above reasons, this Court should deny the Petition for a Writ of Certiorari to review the opinion and judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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